

EXHIBIT C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AMAZON.COM, et al.,
Plaintiffs,) No. C 05-1137 RSM
v.) Seattle, Washington
CEDANT CORP., et al.,
Defendants.)

BEFORE THE HONORABLE RICARDO S. MARTINEZ, DISTRICT JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

NOVEMBER 21, 2005

APPEARANCES:

For Amazon and A 9:

DAVID McDONALD

Also present:

LYNN PASSAHOW
DAVID HADDEN
MICHAEL FANDEL
DOUG OLSON
JAMES FAZIO
STEVE KORNICZKY

Court Reporter:

Laurene Kelly, RDR, CRR
Room 600
1010 Fifth Avenue
Seattle, WA 98104
(206) 553-1899

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

ORIGINAL

WITHOUT REPORTER'S ORIGINAL SIGNATURE
THIS TRANSCRIPT IS NOT CERTIFIED

1 SEATTLE, WASHINGTON MONDAY, NOVEMBER 21, 2005

2 HON. RICARDO S. MARTINEZ, DISTRICT JUDGE 1:40 P.M.

3 PROCEEDINGS:

4 THE CLERK: This is the case of Amazon dot com, et
5 al. versus Cendant Corporation, et al., case number C 05 dash
6 1137, assigned to this court.

7 Will counsel please make their appearances for the
8 record.

9 MR. McDONALD: My name is David McDonald for Preston
10 Gates on behalf of Amazon and A 9.

11 To my left is Lynn Passahow from Fenwick and West and
12 Mr. David Hadden from Fenwick and West in Mountain View.
13 Mr. Hadden will be arguing the motion for our side.

14 THE COURT: Gentlemen, good afternoon.

15 MR. FANDEL: Good afternoon, Your Honor. My name is
16 Michael Fandel from Graham and Dunn.

17 To my right is Doug Olson from Paul Hastings firm, to
18 his right James Fazio, and to his right Steve Korniczky, all
19 from the Paul Hastings firm.

20 THE COURT: And welcome to you gentlemen.

21 Counsel, we basically have two motions today. Let me
22 tell you first of all the Court has received and had a chance
23 to review your motions submitted, the declarations that were
24 attached, the exhibits that came as part of the Court's working
25 copy of materials, and had even a chance to look at some of the

1 case law in this particular case.

2 Obviously the Court will consider and make a ruling
3 on the motion to transfer, first of all, because that will
4 affect what happens with the motion to dismiss. In order to
5 maximize your time and give you an opportunity to argue, both
6 because the Court has not decided what ruling to make on the
7 motion to transfer at this point in time, let me suggest
8 that -- first of all the motion to dismiss is not very complex.
9 I would suggest you spend most of your time on the motion to
10 transfer. All right? But you can certainly spend some time if
11 you wish on the other motion as well. All right?

12 Everybody ready?

13 MR. OLSON: Yes, Your Honor. I'm Doug Olson, and I
14 will argue the motion to transfer.

15 THE COURT: Thank you, Mr. Olson.

16 MR. OLSON: The first of the two cases in question,
17 the Delaware case, was filed first, alleging infringement of
18 Cendant's '370 patent by Amazon. That patent basically
19 describes and claims a recommendation procedure, in other
20 words, other people who have selected the books you select also
21 enjoyed the following books, and in essence that sort of
22 generally describes the nature of the patent. It's broader
23 than that in some other aspects, but I think in view of
24 Amazon's technology and their business that sort of describes
25 what it's about.

1 THE COURT: I don't buy any books from Amazon, never
2 have, but they always send me the recommended cookware because
3 of the cookware that I bought previously, so I understand.

4 MR. OLSON: That's the same thing, Your Honor.

5 THE COURT: All right.

6 MR. OLSON: The -- there was some settlement
7 discussions, and then the Delaware case was temporarily
8 dismissed, and then -- I'm sorry -- the -- some settlement
9 discussions, and then it was reinstated, and then there was
10 a -- this case was filed, and along with this case there was a
11 press release by Amazon, and that press release indicated that
12 this suit was a direct response to the Delaware suit. The
13 press release says, this suit was filed in direct response to
14 Cendant's refiling of their patent infringement suit.

15 Also it was indicated that this was the first time
16 any of the four patents in this suit had ever been sued on.
17 The spokesperson for Amazon said, this is the first time we
18 have asserted any of these four patents.

19 And furthermore it was made clear that they would not
20 have been asserted had Amazon not been sued in Delaware. It
21 goes on to say, we would not have asserted them if Cendant had
22 not filed them against us.

23 And it was made clear that it was a defensive
24 maneuver. It's purely a defensive measure. So you can hardly
25 think of a better example of a defensive suit and a better

1 application of the first-to-file rule.

2 Now, Amazon does not explain or justify the press
3 release in its papers, and they basically ignored it, and I
4 think that it's fair to assume that the very clear language of
5 the press release speaks for itself. This is a defensive
6 action. Now, it seems in this case that the law is clear that
7 the first-filed case should be the one that goes forward and
8 this case should be dismissed or transferred to Delaware.

9 THE COURT: Well, Mr. Olson, isn't part of the
10 problem there, though, with the first-to-file rule, the way I
11 understand it is it would permit a district court to decline
12 jurisdiction over an action when a complaint involving the same
13 parties, same issues has already been filed elsewhere. Is that
14 really what we have here?

15 MR. OLSON: I think it is, Your Honor. And I think
16 Amazon would argue that there has to be an exact identity of
17 issues and parties, and that certainly is not the law as we
18 understand it.

19 In the Google case we cited, for example, that case
20 involved a declaratory judgment action for infringement of a
21 trademark. It was filed in the Northern District of
22 California. The defendant A B W F filed a trademark
23 infringement action in New York and added five additional
24 parties. Now, that's very similar to this case because there
25 are four additional parties in Delaware action to those

1 involved in this action.

2 And in the Google action the court said the fact that
3 there were five additional parties did not prevent the
4 application of the first-to-file rule, and it pointed out that
5 Google had a similar theory of infringement for all of the
6 parties and thus the fact that there were a few more parties
7 was not going to work a situation where the first-to-file rule
8 could not be applied.

9 Amazon alleges a similar theory of infringement for
10 all of the parties in this case, and so we have almost exactly
11 the same situation as was present in the Google case; therefore
12 the fact that there are a few additional parties, some
13 additional Cendant parties, really shouldn't make any
14 difference and the first-to-file rule should be applied. The
15 difference in the parties is not material to the application of
16 the rule.

17 Secondly with regard to the issues Amazon also says,
18 well, the issues are different in this case than they are in
19 the Delaware case, and they cite the fact that there are five
20 patents, four in Seattle, one in Wilmington. Your Honor, as we
21 pointed out in our briefs, these patents are very similar and
22 this is much like the Mastercard case we've cited.

23 In Mastercard a suit was filed for misappropriation
24 of trade secrets and software licenses relating to a particular
25 type of software. The second case was for noninfringement and

1 invalidity of patents relating to that same software and,
2 although facially one might think that those were two different
3 cases or had two different issues, one involving the licenses
4 and trade secrets, the other involving patents, which are sort
5 of the opposite of trade secrets, the court held basically it's
6 the same thing. It's the same dispute, the same general
7 operative facts which are driving both cases, and so they held
8 that, although they weren't exactly mirror images of each
9 other, it was appropriate to apply the first-to-file rule on
10 the basis that the issues were the same. And we think that's
11 the situation here.

12 Another case is the Syngenta case that we've cited.
13 Now, there the court noted that there was an overlap that was
14 sufficient. One case was basically a patent infringement case,
15 the other case was an antitrust case, but the court held that
16 the root issues were close enough so that the two cases could
17 be tried together.

18 Now, what do we have in this case? First of all, in
19 Delaware the '370 patent, as I indicated, was a patent based
20 upon this recommendation procedure, and it's a patent that
21 relates to doing business on the Internet.

22 The '141 patent in this suit is another patent that
23 relates to doing business on the Internet, and that patent also
24 has a recommendation procedure. In that patent the
25 recommendation is made by an affiliate who will recommend

1 products or services of the company that they are an affiliate
2 for, so again there's a recommendation that will steer the
3 Internet customer to goods and services of the patentee.

4 Then there's the -- in addition there's the '399
5 patent, which is on a way of protecting your credit card
6 number; the '079 patent, which is on a -- just a shopping cart,
7 another method of facilitating business on the Internet so that
8 when you make your purchases it facilitates making more than
9 one purchase or more than one selection during a particular
10 session.

11 The '609 patent directs a customer to the areas which
12 will be of particular interest to that customer based upon
13 buying patterns, and buying patterns is connected with the
14 basic recommendation procedure of the '370 patent, because
15 that's what it's based upon. It's based upon buying patterns
16 of other people who bought the same book that you did, and then
17 it directs you to those other things.

18 So basically what these patents are all related to is
19 doing business over the Internet where a customer logs in, has
20 a chance to select from various items which are offered by the
21 seller, and is directed in one way or another to items which
22 might have most interest to him, so there's a lot of similarity
23 between these various patents, particularly with regard to the
24 recommendation method and particularly with regard to the
25 buying patterns, which is part of the '370 patents, and also

1 it's a specific part of the '609 patent, which is a browse
2 graph, and basically the browse graph simply directs you to
3 areas that you would be interested in based upon the initial
4 selections you make when you enter the website of the company
5 that's doing the selling.

6 So there is a whole lot of similarity between these
7 various cases and the patents at issue, Your Honor.

8 Now, as indicated before, in view of the fact that
9 this was simply a defensive action filed in response to the
10 Delaware case, the law clearly indicates that under the
11 first-to-file doctrine this case should be dismissed or
12 transferred to Delaware, and we would request that relief from
13 the Court.

14 In addition it would be proper to transfer this case
15 under the forum non conveniens theory. The key factors in that
16 determination are judicial economy. Judicial economy may be a
17 determinative factor, even if the convenience of the parties
18 and the -- and convenience of the witnesses were to lead to a
19 different result, and that's the holding of the Regents of the
20 University of California versus Lilly case, which is a federal
21 circuit case, and we've cited that in our brief.

22 Also the AT and T case which we've cited indicates
23 that, even if all of the other factors are near equipoise,
24 still it would be proper to transfer the case if there was a
25 strong relationship between the cases. And the AT and T case

1 we've cited also indicates that judicial economy is one of the
2 important issues that should be considered.

3 Now, with regard to the issues of judicial economy,
4 we have five patents in this case, Your Honor, and there will
5 be five Markman hearings, and there will be possibility of,
6 particularly between the '370 patent, which is in Delaware, and
7 the four other patents, which are now the subject of the action
8 in this case -- there's definitely a possibility that there
9 will be overlapping of the issues.

10 Certainly the term recommend is used, as we've
11 indicated in our brief; so -- in other places the words might
12 not be exactly the same, but the claim construction issues are
13 going to be very similar because they're similar processes for
14 similar purposes for Internet commerce.

15 So I would submit that it's incredibly important from
16 a judicial economy standpoint to have one court dealing with
17 all of the issues of claim construction in a Markman hearing.

18 Secondly discovery issues. It's important, I think,
19 Your Honor, to have consistency in the approach to various
20 issues by the parties. The parties should not be taking a very
21 constrictive approach in one case and seeking broad discovery
22 in another. I think that can best be handled by having all of
23 the cases in one court before one judge, rather than the
24 possibility of having a different approach taken to similar
25 issues in the two cases.

1 And I think that certainly when we come to the issue
2 of trial it would be much more efficient to have these issues,
3 with the same parties and essentially the same patents, all
4 directed at the same subject matter, just tried once instead of
5 twice, as would be the case if these cases continue to go in
6 separate courts.

7 The center of gravity analysis was carried out by
8 both parties. There's a little bit of a difference there. I
9 think one of the big differences is that the -- none of the
10 center of gravity factors considered by Amazon included
11 judicial economy, and we think that's an important thing.

12 Now, in terms of convenience of the parties, there
13 are some parties -- and if I may approach the board here, Your
14 Honor.

15 THE COURT: You may.

16 MR. OLSON: Starting with Seattle, where this case is
17 pending, we then have the Delaware case, and we made this
18 insert, and I hope I'm not offending the Court by showing this
19 on a map. I've been in the eastern area many times. I kind of
20 keep forgetting just how close those states are and how they're
21 arranged. I had always forgotten that Delaware is kind of
22 cozied up both to New Jersey and also to Pennsylvania.

23 But in any event this is Wilmington. We have
24 calculated these distances by several means. They come out to
25 just a little over or just a little under a hundred miles. We

1 would not object to the service of process to any of these
2 cities, Norwalk, Parsippany, and New York, on the basis that
3 there's a little bit more than a hundred miles, and I think
4 that particularly most of the people are located in Parsippany
5 and they would easily be subject to the court's jurisdiction in
6 Delaware, based upon my calculations. Again the area covered
7 back there and probably about half or a third the area that the
8 State of Washington covers.

9 Now -- and then we have Chicago, Your Honor, and
10 Chicago is more than a hundred miles from the courthouse in
11 Delaware but it's still a lot closer than the -- a lot closer
12 than going all the way to Seattle.

13 So certainly for all of the Cendant parties the
14 Delaware courthouse is much more convenient.

15 Now, there -- the location of the infringement, Your
16 Honor, is another important factor. As we've indicated in our
17 papers, the infringement primarily -- the alleged infringement
18 by Cendant primarily takes place in the Northeast area around
19 Parsippany, and so that's an important factor in all the
20 analyses that people look at.

21 THE COURT: Counsel, before we leave the factor
22 involving convenience of the parties and of the witnesses, you
23 have not identified any nonparty witnesses at this point in
24 time. Understandably so at this stage in the game. Let me ask
25 you this: In reading I think it was Decker Coal Company versus

1 the Commonwealth, sets out the eight factors that you're
2 talking about and that you point to in your moving documents,
3 when the Court looks at all these eight factors, when you're
4 looking at the convenience of the parties and the witnesses, in
5 this particular case, understanding that there may have to be
6 Markman hearings, that there will have to be Markman hearings
7 and trial testimony as well, can the Court under the statute
8 you're looking at consider the fact that nonparty witnesses
9 will necessarily have to appear for both the Markman hearing
10 and for trial, even if the defendant has not yet named those
11 witnesses?

12 MR. OLSON: Your Honor, that's one of the factors.
13 Now, a number of courts have addressed that in various
14 different ways, and in fact the case with Amazon, that Amazon
15 is involved in noted -- case that Amazon is involved in -- and
16 I'll try to get the cite for you in a second, Your Honor --
17 noted that Amazon had identified a lot of nonparty witnesses
18 and it was pretty hard to evaluate whether that was accurate at
19 the time and whether they would actually be involved in the
20 trial and, if so, how that would occur.

21 A lot of times I think nonparty witnesses testify by
22 deposition, either reading of the deposition or videotape,
23 because it may be possible to subpoena them for their
24 deposition but to get them to attend a trial is not so simple,
25 and in my experience, if the nonparty witness is willing to

1 voluntarily go to a trial, even though there's no subpoena
2 power, that really isn't a major inconvenience in today's world
3 where people are able to schedule trips to trials all over the
4 country.

5 So I think in the limited case where there's a
6 nonparty witness who's willing to cooperate with you, who's
7 willing to come to trial, it's almost in the category of party
8 witnesses or expert witnesses who have some interest in the
9 outcome of the case and are willing to come to trial. So I
10 don't think that probably makes too much difference. There
11 may -- I'm sorry, Your Honor. It was the Pinpoint versus
12 Amazon case, and that's cited on page 4 of our reply brief.

13 And particularly the Court observed that Amazon
14 failed to provide evidence that former employees' testimony was
15 not cumulative and would not be provided voluntarily.

16 THE COURT: I guess, Mr. Olson, my question was more
17 directed towards the defendants' nonparty witnesses. I don't
18 know if there will be any. Having handled the lengthy Markman
19 hearing not too long ago, I assume that there's always experts,
20 there will be nonparty witnesses from the defense perspective.
21 Is it more convenient for them to be closer to the East Coast
22 than it is closer to the West Coast?

23 MR. OLSON: Your Honor, we haven't -- we have not
24 selected our experts yet, and I would expect that it would be
25 more convenient for them to be closer to the East Coast, but I

1 can't really make that representation, Your Honor, because we
2 simply don't know who they are; and no discovery has occurred
3 in this case, so we can't really identify specifically
4 witnesses who would be attending the trial on our behalf or
5 third parties.

6 And that's apparently the situation with Amazon also.
7 With the exception of a couple of inventors, I don't think they
8 have been able to -- and a couple of patent attorneys I don't
9 think they have been able to identify anybody, and I think the
10 inventors and the patent attorneys certainly would be in the
11 category of the cooperative third parties.

12 THE COURT: I don't want to take up too much of your
13 time, counsel. You're running out of time. I don't know if
14 there's --

15 MR. OLSON: Yeah. I just want to make a couple quick
16 points, Your Honor.

17 In terms of the pendency of related litigation, which
18 is a factor, this is a factor we think is important. It falls
19 under, I think, the issues I discussed before regarding
20 judicial economy, and I think this is a factor that really
21 hasn't been touched by the brief of Amazon. We think it's an
22 important.

23 The public interest, all of the parties are
24 corporations of Delaware, so there's an interest certainly in
25 the State of Delaware in having corporations which are

1 incorporated there in front of it for these issues. And then,
2 finally, the familiarity of the court I would guess is pretty
3 much of a neutral issue.

4 So I think the key issues here are the pendency of
5 the litigation, the judicial economy, and the fact that there
6 is a strong -- we have five parties, don't know how many people
7 would be involved, but they are all pretty much located right
8 in the Northeast, and it would be much more convenient for them
9 to be in attendance at trial there than to have to come or to
10 have the opportunity to come to Seattle.

11 Thank you, Your Honor.

12 THE COURT: One last question, Mr. Olson. I just
13 want to double-check. You do agree that the burden -- you can
14 try to sway the Court in this case -- is on the defense.
15 Correct?

16 MR. OLSON: Well, we're bringing the motion but I
17 think the -- I don't think that there's any presumption that
18 just because the case is filed that it is the more convenient
19 forum, and I think, in view of the press release, whatever
20 presumption might be there is more than overcome by, you know,
21 the press release that it was filed as a defensive measure as
22 opposed to something for convenience.

23 And, Your Honor, I would point out that in the notice
24 of related actions the Delaware case -- this case was
25 identified, and in the second-to-the-last sentence it indicated

1 that the -- that this case, civil action number 205 CV 01137
2 RSM, involves substantially the same parties as in the Cendant
3 case, so we have an admission that it's substantially the same
4 parties, Your Honor, so I think that admission plus the
5 admission in the press release over -- outweigh and overcome
6 any presumption that there might be that this is an appropriate
7 venue.

8 THE COURT: Thank you very much, counsel.

9 What I'll do is we'll have your opponent's response
10 simply to the motion to transfer. Then if anyone over there
11 wants to argue about the motion to dismiss, we have a certain
12 period of time we'll get into that.

13 MR. HADDEN: Good afternoon, Your Honor. Dave Hadden
14 for Amazon dot com and A 9.

15 Let me start, Your Honor, with your last question.
16 And, as the Supreme Court said in Gulf Oil, when a plaintiff
17 sues in their home court on their home turf, that choice is
18 entitled to a very strong presumption. It should not be set
19 aside lightly.

20 Now, Cendant has pointed to this press release as
21 some reason to set aside that presumption. There is nothing
22 nefarious about Amazon's press release. Amazon had a public
23 policy of not hindering web commerce by asserting patents. It
24 files for patents, prosecutes them; it obtains them as a
25 defensive deterrent measure.

1 I think, as Your Honor knows from a recent case
2 involving some insurance litigation, Amazon gets sued a lot on
3 patents and it needs some defensive protection. That's why it
4 acquires patents. So when it got sued by Cendant on patents it
5 used its defensive arsenal to sue back. There's nothing
6 nefarious about that.

7 And to put out a press release to alert the rest of
8 the web community that this was not signalling a change in
9 Amazon's patent strategy was not now going to go out and attack
10 people unilaterally. That was the purpose of the press
11 release.

12 There is nothing about that press release or those
13 actions that brings this case into the first-to-file rule. As
14 the Ninth Circuit said in the Pacesetter case, the
15 first-to-file rule applies when there are duplicative lawsuits
16 pending in two jurisdiction, and it defines what a duplicative
17 lawsuit is. That is one where, if one of the suits is
18 determined, it will leave little or nothing to be determined in
19 the second suit.

20 We're not even in that ballpark. Whatever happens in
21 Delaware is not going to determine one issue in this case and
22 vice versa. The Delaware case involves a single patent that's
23 held by Cendant Publishing. They're accusing Amazon of
24 infringing that patent. The only issues in that case are the
25 validity of Cendant Publishing's patents and the operation of

1 certain features in Amazon dot com's website. None of those
2 issues are in this case, and Cendant Publishing is not even a
3 party to this case.

4 Now, in this case involving four patents, three of
5 which are owned by Amazon -- one is owned by a subsidiary A 9,
6 and the issues involve the operation of the defendant's
7 websites, Avis, Budget, Orbitz, Trilegiant, and Cendant. None
8 of those companies are parties in Delaware. Their technology
9 is not at issue in Delaware. Amazon's patents are not at issue
10 in Delaware. And A 9 is not a party in Delaware.

11 So of the eight parties to these collective suits the
12 only common party is Amazon dot com.

13 THE COURT: Mr. Hadden, you did file a notice of
14 related case back there.

15 MR. HADDEN: We did, Your Honor. That was because
16 actually Cendant didn't file one as was required by the local
17 rules back there relating to its original case that it filed
18 and then dismissed, so to fill that gap we filed one
19 identifying both the previously-filed Cendant suit and, out of
20 an abundance of caution, we notified the court that there was
21 another suit pending out here. That's not an admission. The
22 parties are who the parties are.

23 THE COURT: Isn't it true, though, that, even though
24 these patents -- there are five patents, as you indicate, one
25 back there in the Delaware matter -- that they are all really

1 interrelated?

2 MR. HADDEN: They're not related at all, Your Honor.
3 Four of them out here are related to inventions that were done
4 by Amazon and its employees in developing Amazon's business.
5 The patent back East is owned by Cendant Publishing. It has
6 nothing to do with technology developed by Amazon. There's no
7 relation between the two.

8 The only relation that Cendant points to is that they
9 all have to do with doing business on the Internet. But
10 there's probably a hundred cases pending in this country about
11 doing business on the Internet, and the theory that they should
12 all be consolidated because of that level of commonality is
13 just sort of nonsense, Your Honor.

14 Amazon must be involved in five different patent
15 cases right now involving business on the Internet and no one
16 has suggested that those should all be consolidated. That is
17 the only overlap they have pointed to, and they have not cited
18 a single case where that level of overlap has supported either
19 transfer or consolidation.

20 So in fact there's no connection between these
21 patents and Cendant's patents. There's no connection between
22 the allegedly infringing activities in both cases. One case,
23 they're performed by Cendant and its affiliates back East.
24 Another case, they're performed by Amazon here. Unrelated
25 people, unrelated actions.

1 So the first-to-file rule has nothing to do with this
2 case and, as the Ninth Circuit held in All Trade, if the issues
3 or the parties are dissimilar in the two courts, applying the
4 first-to-file rule is reversible error because it's a
5 misapplication of the law.

6 So, given that there's no first-to-file rule and
7 given that these cases have no relation that would allow them
8 to be consolidated in any court, we're left with the private
9 1404 A analysis, and all of those factors weigh heavily in
10 keeping the case here in Seattle.

11 The first one, as I mentioned, is what the Supreme
12 Court and Ninth Circuit said repeatedly, which is when a
13 plaintiff sues in his home court he is entitled to great
14 deference, and that should not be put aside lightly.

15 Secondly, this is furthest thing from forum shopping.
16 Forum shopping is defined as choosing a forum that has little
17 or no connection with the facts of the case. In this case the
18 forum is Amazon's home base. This is where their inventions
19 were developed. It's where their inventors are, including,
20 importantly, five third-party inventors who are no longer
21 Amazon employees. Those people cannot be compelled to testify
22 in Delaware.

23 In addition there are three prosecuting attorneys who
24 prosecuted the patents at issue in this case. All of them were
25 in the Seattle area. All of them are third parties. All of

1 them cannot be compelled to testify in Delaware. As the
2 Supreme Court noted, this is a key factor in this type of
3 analysis. You choose the forum where live witnesses can
4 testify.

5 So again there's a total of eight identified, very
6 important, third party witnesses, including inventors, who have
7 to testify likely at a Markman hearing. The convenience of
8 those nonparty witnesses, as the Ninth Circuit has repeatedly
9 said, is key. Parties, particularly big corporations, can fly
10 across the country. That is not an undue burden. But where
11 you have unrelated third parties their convenience is
12 important.

13 THE COURT: Won't that be the same for their expert
14 witnesses?

15 MR. HADDEN: I'm sorry. I didn't mean to interrupt
16 Your Honor.

17 THE COURT: Go ahead.

18 MR. HADDEN: I'm not talking about expert witnesses.
19 I'm talking about fact witnesses who are no longer affiliated
20 with any company. Expert witnesses get paid for their travel
21 time. That's not a burden.

22 THE COURT: May that not be the same, though, for
23 their nonparty witnesses?

24 MR. HADDEN: They haven't identified any nonparty
25 witnesses. These are fundamental people to this case. These

1 are inventors. They have not identified anyone at all, much
2 less anyone who will be that crucial to the case, in their
3 papers.

4 THE COURT: Let me ask you a more basic question.

5 MR. HADDEN: Surely.

6 THE COURT: I guess I'm kind of struggling with a
7 little bit. My understanding is that under 28 USC Section
8 1400 B, the special venue provision for patent suits, that
9 requires that an action for patent infringement be filed -- and
10 let me get the quote right -- in the judicial district where
11 the defendant resides or where the defendant has committed acts
12 of infringement and has a regular place -- regular and
13 established place of business.

14 Do Avis, budget, Orvitz [sic], et cetera have a
15 regularly-established place in business in Seattle, or are they
16 merely doing business in Seattle?

17 MR. HADDEN: I believe, Your Honor, that that statute
18 has been construed so that venue and personal jurisdiction are
19 co-extensive in patent cases. I don't have a cite for that,
20 but that, I am confident, is the law for the federal circuit,
21 Your Honor. So if you are doing business sufficiently to
22 subject yourself to personal jurisdiction you fit within the
23 venue statute.

24 THE COURT: Okay.

25 MR. HADDEN: It's no doubt that Avis has a place of

1 business, too. I think I saw it this morning on my way in from
2 the airport. So I don't think that is any hurdle, Your Honor.

3 So at the end of the day, putting aside the fact that
4 there is no first-to-file rule, there is no judicial economy
5 for transferring this case because it cannot be consolidated,
6 we're left with Amazon's legitimate choice of its home forum,
7 which should be given great deference, and we're left with the
8 Ninth Circuit's decision in Decker Coal, which we cited Your
9 Honor, that said that under 1404 A a court shouldn't just shift
10 in convenience from a plaintiff to the defendant.

11 And that's essentially what they're asking for here,
12 Your Honor. You strip away all the smoke and mirrors, the only
13 argument they have is that they have more people in the
14 Northeast and somehow now Chicago's part of the Northeast, but
15 that's not sufficient as a matter of law, Your Honor.

16 And I can address the individual cases, if you'd
17 like, that Cendant cited. In all of those cases the technology
18 involved in the two cases were the same parties' technology.
19 There's never a case like this where it's one side's patents in
20 one case and somebody else's patents in another case. That's
21 just not true.

22 The Google case, for instance, the Court held that
23 the liability of these extra defendants were all flowing
24 directly from Google's liability so there would be no
25 additional issues with them.

1 Mr. Olson's suggestion that there's the similar
2 theory between this case and the Delaware case, that's just not
3 true, Your Honor. The theory in the Delaware case is that
4 Amazon is infringing Cendant's patents. The theory here is
5 that this group of five companies is infringing four of
6 Amazon's patents. There's no similarity in those theories.
7 There's no overlap. That's not what happened in Google.

8 Similarly, Your Honor, the Mastercard case, it
9 involved the same parties' technology.

10 The Syngenta case that was mentioned, that was not
11 even a transfer. It was just a consolidation of a patent in an
12 antitrust case.

13 So there's no case that they have cited that's
14 anywhere close to the facts of this case in which a court has
15 transferred under 1404 A or the first-to-file rule.

16 I can get you those cases on personal jurisdiction
17 and 1400 B, Your Honor.

18 THE COURT: Thank you.

19 MR. HADDEN: If there's nothing else, I'll sit down,
20 Your Honor.

21 THE COURT: Let me ask you one other question.

22 MR. HADDEN: Surely.

23 THE COURT: In looking at 1404 A there really are two
24 major factors, and I understand the eight factors the Court
25 looks at under Decker Coal. But the Court has to look at -- to

1 determine whether or not the district in which defendants seek
2 to have the action transferred is one in which the action could
3 have been brought.

4 That's really not at issue here?

5 MR. HADDEN: It's not an issue.

6 THE COURT: We're looking at the second factor, and
7 that is that the transfer be for the convenience of the parties
8 and the witnesses and in the interest of justice. And that's
9 maybe where some of the equities they're pointing to come in.

10 Let me ask you this question: Having handled
11 hundreds of settlement conferences in civil cases myself, would
12 it make sense to have in this case maybe one magistrate judge
13 looking at all of these issues trying to reach a global
14 settlement?

15 MR. HADDEN: I think if there was going to be a
16 global settlement that could be done.

17 Typically these cases settle through private
18 mediators. Private mediator can look at the facts of the case
19 here in Delaware. I don't believe that there's any basis for
20 transferring the case to try to facilitate a global settlement,
21 Your Honor.

22 THE COURT: Thank you, Mr. Hadden.

23 Does someone wish to address the motion to dismiss?

24 MR. FANDEL: Your Honor, Mike Fandel.

25 Just a point of clarification, if I could. We had

1 called earlier this morning to ask about time, and maybe we
2 miscommunicated, but we were under the impression that there
3 were 20 minutes for the transfer motion and 20 minutes for the
4 motion to dismiss. It doesn't sound like that's what the Court
5 expects. We kind of prepared based on another assumption.

6 How much -- I guess we want to know how much time we
7 have to argue the motion to dismiss.

8 THE COURT: You're the only thing we've got this
9 afternoon, so I don't know. You can take up to 20 minutes.
10 Not that you need 20 minutes. You can take up to 20 minutes.

11 MR. FANDEL: Thank you, Your Honor.

12 THE COURT: Mr. Korniczky's going to argue.

13 MR. KORNICZKY: Good afternoon, Your Honor.

14 Your Honor, our motion to dismiss is based on a
15 number of different theories. Let me first address the Cendant
16 parent company.

17 Simply put, Cendant, the parent company, should be
18 dismissed because it is not a proper party here. Cendant does
19 not operate the websites that have been alleged to infringe.
20 They didn't develop the websites. They don't exert control.
21 All of this is established in the Bach declaration,
22 particularly in paragraphs 5 through 7.

23 In addition, you know, as also is -- is also set
24 forth in the Bach declaration, paragraphs 8 through 10, Cendant
25 strictly observes all corporate formalities. There have been

1 no facts pled here that suggest otherwise. There's no facts
2 here that justify piercing the corporate veil or any alter ego
3 agency theory of liability. So with respect to Cendant the
4 parent, I think there's no dispute that that entity should be
5 dismissed from this case.

6 With respect to all of the defendants, what's
7 happened here is Amazon has applied this sort of shotgun theory
8 of liability where they have asserted infringement of three
9 different theories of liability based on, I think, four
10 different patents against five different defendants. There's a
11 case that's right on point here, which is the Gen-Probe case.
12 Although there there were only two patents that were asserted,
13 and the court -- I'd like to read it. If I could read at
14 page -- it's the Gen-Probe case, 926 Federal Supplement 948 at
15 page 960.

16 And there, addressing the liability allegation, the
17 court states that they assert that liability in a confusingly
18 conclusory manner, accuses each of five defendants of three
19 very different causes of action on two different patents. Here
20 we have four different patents, all in one conclusive sentence
21 without adequately specifying the grounds for plaintiff's
22 belief that any of these entities had infringed.

23 And then it goes on and it says that the federal
24 rules do not require that the plaintiff plead with
25 particularity the specific patent claims that have been

1 infringed but the rules do require that defendant be given fair
2 notice of what the plaintiff's claims is and the grounds upon
3 which it rests. The plaintiff's shotgun approach is clearly
4 deficient to serve either of these purposes.

5 That's exactly what's happening here. In one
6 instance if they're relying on -- well, let me take a step
7 back. Amazon's argument is we followed Form 16. They
8 absolutely did not follow Form 16. Form 16 sets forth an
9 approach where there's one patent asserted based on direct
10 infringement.

11 Here they're alleging direct infringement,
12 contributory infringement, and inducing infringement, and you
13 can't allege all three or any two of those allegations based
14 upon the same facts. Here they don't tell you what facts
15 they're alleging.

16 So they didn't follow Form 16, which is directed
17 towards direct infringement. They did follow the approach that
18 was criticized and in which the case was dismissed in the
19 Gen-Probe case.

20 THE COURT: Well, let's cut through this. Let's say
21 I agree with you. Is the motion to dismiss really the proper
22 remedy? Is a dismissal the proper remedy here?

23 MR. KORNICZKY: The proper remedy would be to
24 transfer the case, but if that's not an option --

25 THE COURT: Aside from that. All right?

1 MR. KORNICZKY: Really what has to happen here is
2 they have to give us fair notice of what they're alleging.

3 THE COURT: Why can't they do that?

4 MR. KORNICZKY: I don't think there's any reason they
5 shouldn't, unless they haven't established a case. We think
6 what happened here is we filed our complaint, two days later
7 they filed theirs and didn't do their homework, so they're
8 expecting us to come back and do it.

9 Their position in the complaint was we can do this in
10 discovery. But then what do we need the federal rules for,
11 because what you're going to do is you're going to have five
12 defenders and you're going to have one plaintiff and, running
13 around trying to figure out what's at issue, you're going to
14 drag the case out, you're going to run up the expenses for
15 everybody, when all you have to do is break out our allegations
16 and tell us what the basis is. That hasn't been done here. So
17 at a minimum what has to happen is that they have to provide us
18 with the basis for each one of those allegations.

19 Now, here what you have are five different websites.
20 Well, the website is our business, and if you turn to any one
21 of those what you'll see are there's a whole slew of different
22 services, different products. I think if you look at the Bach
23 declaration, paragraph 15, with respect to one of the websites
24 it covers service center networks, emergency roadside
25 assistance, new car summaries. They have a driver's discount,

1 opportunities to customers on dining or shopping. They have
2 discounts and rebates for women. They have pet privileges.
3 And it just goes on and on. They have educational services.

4 We as a defendant should not have to go forward and
5 try to figure out which one of these are they alleging
6 infringed. This would be akin to taking General Motors and
7 saying which car -- General Motors infringes our patents but
8 they don't tell us which car, and then they add in Chrysler and
9 Ford and we got to figure out four different patents with
10 different businesses and a hundred different cars. That's the
11 situation we have here.

12 THE COURT: Thank you, counsel.

13 MR. KORNICZKY: You're welcome, Your Honor.

14 THE COURT: Mr. Hadden, they're making you work
15 today.

16 MR. HADDEN: They are. Hello again, Your Honor.

17 Let me start on the last point. First, Amazon's
18 complaint meets the requirements of Rule 8 and the forum that
19 it has been approved. For each defendant Amazon identified
20 what patent they infringed and how they did it by identifying
21 their website.

22 Now, there's no allegation that Cendant sells plane
23 tickets and rents cars and sells soap or whatever else they do.
24 We didn't identify any of those products. That's a red
25 herring. We're not accusing their cars. We're not accusing

1 their tickets.

2 We're accusing their website. We specifically
3 identified the website by providing its URL. It's the
4 operation of the website, not what they sell over it, that's
5 infringing the patent. And we identified for every defendant
6 explicitly a website that was infringing and identified the
7 patents that were infringed. That's all the federal rules
8 require, and that's what we provided, in fact to be more
9 specific than the electric motor category that's specified in
10 the form.

11 Let me go to -- unless Your Honor has questions with
12 regard to the Cendant issue.

13 THE COURT: Go ahead.

14 MR. HADDEN: Okay. Amazon does not need to pierce
15 the corporate veil to sue Cendant for induced infringement.
16 Federal circuit said that in Manville. So what do we know? We
17 know from public information that Cendant both encourages and
18 aids its -- the infringement of its subsidiaries. It does that
19 by supporting and facilitating their websites. It's listed as
20 the administrator of all the websites except the Orbitz. And
21 it acknowledges doing joint marketing of these websites which
22 are infringing.

23 Now, as the federal circuit said in TiVo, inducement
24 is as broad as a range of actions by which one in fact causes
25 or urges to, encourages or aids another to infringe a patent.

1 Now, at this stage it can't be said that Amazon can prove no
2 set of facts under which Cendant's actions fit under that
3 general description.

4 In fact, from what we've seen from public
5 information, Cendant is directly infringing by hosting the web
6 servers that run the Avis and Budget sites. They are operating
7 the computers that are performing the steps that are claims in
8 these patents. Now, in that case Avis or Budget or
9 Trilegiant is likely inducing that infringement by providing
10 the infringing content and program, but Cendant itself is
11 likely to direct infringing. And this motion from Gen-Probe
12 that you can't assert both indirect and direct infringement is
13 just wrong.

14 That has been rejected by scores of courts since
15 then. And the reason is simply, Your Honor, as even Gen-Probe
16 says, you need not identify the specific claims within a patent
17 that you are asserting at the pleading stage. And whether a
18 particular party is infringing directly or by inducement
19 depends on the particular claims.

20 For example, frequently you'll have patents, Your
21 Honor, that will have a product claim and then they will have a
22 method claim that covers the use of the product. And if the
23 defendant is selling the product they are likely directly
24 infringing the product claim and inducing the infringement of
25 the method claim by selling a product that performs the method

1 to their customers.

2 So, because you're not required to identify the
3 specific claims you're asserting when you file a complaint,
4 you're not also not required to identify whether or not the
5 claim is based on direct infringement or indirect infringement,
6 and Snap-on and scores of other cases since Gen-Probe have
7 agreed with that.

8 And there's actually a claim in this case where that
9 applies, so one of these patents is this associates patent.
10 It's '141. And in that patent, as is frequently the case in
11 Internet patents, different entities' actions are claimed by
12 different claims.

13 So that involves a situation where you have a sort of
14 primary merchant who allows other people to link to their site
15 and they pay them commissions, and some of those claims cover
16 the people linked to the site and some of those claims cover
17 the person running the primary site.

18 Now, the defendants likely directly infringe the
19 claims that cover the primary site and they induce infringement
20 by their affiliates of these other claims. So there's nothing
21 improper about that. The cases that they cite that say that
22 you can't both infringe directly and indirectly are cases
23 involving venue disputes where someone tries to say that a sale
24 that is infringing that occurs in one district was induced by
25 some presale activity in another infringement -- in another

1 district -- I'm sorry, Your Honor -- and the courts say no,
2 that's one infringing act. You can't slide it two different
3 ways to get around the venue statute.

4 But that's not what's going on in this complaint,
5 Your Honor.

6 THE COURT: Thank you very much.

7 MR. HADDEN: Thank you.

8 THE COURT: Anything you want to say in response?

9 MR. KORNICZKY: Well, maybe just one point just with
10 respect to what other cases are saying, Your Honor.

11 The complaints in virtually all the cases that are
12 identified in their brief provided a far more detailed
13 description of what the products or services were that
14 allegedly infringed.

15 In one of the cases that Amazon cites, the Oki case
16 they relied on, the court distinguished Gen-Probe. In this
17 particular case they pointed out that the plaintiff had in fact
18 separated out each of those -- direct infringement, inducing
19 infringement, contributory infringement -- and what the court
20 recognized is that in each case the court is addressing
21 particular organizational deficiencies of the respective
22 pleadings.

23 So if you're dealing with one case which is only one
24 patent and the product at issue is pretty straightforward,
25 that's one thing. Here you've got five different -- five

1 different defendants, you've got four different patents, and
2 then you've got easily in the hundreds of services; so that's
3 the distinction, Your Honor.

4 Thank you.

5 THE COURT: Thank you.

6 Gentlemen, thank you very much. Let me tell you what
7 my usual standard practice is, which I will follow in this
8 case. It's to take your arguments back, review once again the
9 written motions as well as the specific case law that you
10 focused on here.

11 Obviously the Court will focus on the motion to
12 transfer first. If the Court decides not to grant that motion,
13 then we'll focus on the motion to dismiss or ask them to
14 produce a more definite statement. Hopefully -- we just got
15 done with about a two-and-a-half-week-long civil trial, just
16 got done on Friday. I'm a little bit behind where I want to
17 be, especially with the holidays coming up, but the hope is to
18 be able to have a written order for you certainly by the end of
19 the month. All right?

20 MR. KORNICZKY: Thank you, Your Honor.

21 MR. HADDEN: Thank you, Your Honor.

22 THE COURT: We'll be at recess.

23 (At 2:40 p.m. proceedings were adjourned.)
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

--o0o--

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

Laurene Kelly
Laurene Kelly

This 19th day of JANUARY, 2006.

WITHOUT REPORTER'S ORIGINAL SIGNATURE
THIS TRANSCRIPT IS NOT CERTIFIED

EXHIBIT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMAZON.COM and A.9.COM, INC.,

Plaintiffs,

v.

CENDANT CORPORATION; TRILEGIANT
CORPORATION; ORBITZ, LLC; BUDGET
RENT A CAR SYSTEM, INC., and AVIS RENT
A CAR SYSTEM, INC.,

Defendants.

CASE NO. C05-1137RSM

ORDER ON DEFENDANTS' MOTION
TO TRANSFER

This matter is before the Court for consideration of a motion by all defendants to transfer this case, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the District of Delaware. Defendants have also concurrently filed a motion to dismiss pursuant to F.R.Civ. Proc. 12(b)(6), but have asked that the motion to transfer be considered first. Oral argument was heard on November 21, 2005, and the parties' memoranda and exhibits have been fully considered. For the reasons which follow, the Court shall GRANT the motion to transfer, and DENY the motion to dismiss, without prejudice to renewal in the Delaware court.

BACKGROUND

This is a patent infringement case, involving four software patents held by plaintiffs Amazon.com ("Amazon") and A9.com (the assignee of one of the four patents at issue here). They name as defendants Cendant Corporation ("Cendant") and its subsidiaries Trilegiant, Orbitz, Budget Rent-a-Car

1 (“Budget”), and Avis Rent-a-Car Systems (“Avis”). All patent infringement allegedly occurred on
2 defendants’ websites. All parties (plaintiffs and defendants) are incorporated in Delaware. This
3 is not the first time these parties, or their subsidiaries, have met in court. In October 2004, Cendant
4 Publishing, Inc., another subsidiary of Cendant, filed suit against Amazon for infringement of a different
5 patent, the “370” patent, in district court in Delaware. The parties agreed to try to settle their dispute,
6 and Cendant Publishing dismissed the case. Upon failure of the settlement negotiations, Cendant
7 Publishing re-filed the case in Delaware on June 18, 2005. Two days later, Amazon filed this suit here.
8 At the time, Amazon made public statements describing this lawsuit as “purely a defensive measure.”
9 See, Declaration of James Fazio, Exhibit C. According to Amazon spokesperson Patty Smith, “This suit
10 was filed in direct response to Cendant’s re-filing of their patent infringement suit. This is the first time
11 that we have asserted any of these four patents, and we would not have asserted them if Cendant had not
12 filed against us. It’s purely a defensive measure.” *Id.*

13 The patents at issue in this case are: (1) the ‘339’ patent, which is directed to secure methods for
14 transmitting credit card authorizations over a non-secure network; (2) the ‘141’ patent, which enables
15 customers to post recommendations of products or services on the Internet; (3) the ‘079’ patent, which
16 provides customers with a selection of shopping baskets from which they can choose a particular shipping
17 method, delivery, or payment option; and (4) the ‘609’ patent, which discloses use of a “browse graph”
18 that helps on-line shoppers to navigate the internet to reach goods and services in which they might be
19 interested. The patent at issue in the Delaware case is the ‘370’ patent, which discloses a method of
20 making recommendations of goods and services to potential customers based on buying history of other
21 customers.

22 Defendants have moved to transfer this action to the Delaware court pursuant to 28 U.S.C. §
23 1404(a), which states that “[f]or the convenience of parties and witnesses, in the interest of justice a
24 district court may transfer any civil action to any other district or division where it might have been
25 brought.” The purpose of this section is to “prevent the waste ‘of time, energy, and money’ and ‘to
26 protect litigants, witnesses and the public against unnecessary inconvenience and expense.’ ” *Van Dusen*
27 *v. Barrack*, 376 U.S. 612, 616 (1964) (quoting *Continental Grain Co. v. The Barge FBL-585*, 364 U.S.
28

1 19, 26-27 (1960). The statute “displaces the common law doctrine of *forum non conveniens*” with
2 respect to transfers between federal courts. See *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.
3 2d 834, 843 (9th Cir. 1986). Section 1404(a) is not, however, simply a codification of the common law
4 doctrine. In passing § 1404(a), Congress “intended to permit courts to grant transfers upon a lesser
5 showing of inconvenience” than was needed for dismissal under the doctrine of *forum non conveniens*.
6 *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

7 The statute has two requirements on its face: (1) that the district to which defendants seek to have
8 the action transferred is one in which the action “might have been brought,” and (2) that the transfer be
9 for the convenience of parties and witnesses, and in the interest of justice. § 1404(a). There is no
10 question here that the action could have been brought in Delaware district court. Venue for a patent
11 infringement case is restricted: the case must be brought where the defendant resides or “where the
12 defendant has committed acts of infringement and has a regular and established place of business.” 28
13 U.S.C. § 1400(b). All parties, both plaintiffs and defendants, are incorporated in Delaware and subject
14 to personal jurisdiction there. The Delaware court also indisputably has subject matter jurisdiction over a
15 patent infringement complaint. The decision to transfer, then, turns on whether the Court finds such
16 transfer to be proper under the “convenience of parties and witnesses” and “interest of justice” standards.
17 The burden is on defendants to demonstrate that the transfer is warranted. *Saleh, et al., v. Titan*
18 *Corporation, et al.*, 361 F. Supp. 2d 1152, 1155 (C.D.Cal. 2005).

19 The parties have both argued their positions using the eight-factor test from *Decker Coal Co. v.*
20 *Commonwealth Edison Co.*, 805 F. 2d 834 (9th Cir. 1986). Defendants list these as (1) the convenience
21 of the parties and the witnesses; (2) the location where the alleged events in the lawsuit took place; (3)
22 the relative ease of access to sources of proof; (4) the plaintiff’s choice of forum; (5) the pendency of
23 related litigation in the transferee forum; (6) the relative congestion of the two courts; (7) the public
24 interest in the local adjudication of local controversies; and (8) the relative familiarity of the two courts
25 with the applicable law. *Id.* at 843. These factors were adapted from the traditional *forum non*
26 *conveniens* analysis of public and private interest factors. *Id.*; *Saleh*, 361 F. Supp. 2d at 1155. Because
27 these factors cannot be mechanically applied to all types of cases, they shall be considered here under the
28

1 statutory requirements of convenience of witnesses, convenience of parties, and the interests of justice.

2 **1. Convenience of the parties.**

3 Amazon asserts that the plaintiff's choice of forum should be given great weight, and has cited a
4 great many cases to that effect. However, as noted by one California court, "[t]he courts have developed
5 a bewildering variety of formulations on how much weight is to be given to plaintiff's choice of forum."
6 *Saleh*, 361 F. Supp. 2d at 1156 (quoting 15 Wright, Miller and Cooper, *Federal Practice and Procedure*
7 § 3848 at 375.) Because § 1404 application results in transfer, not dismissal as in *forum non conveniens*,
8 a lesser showing of inconvenience is required to upset plaintiff's choice. *Id.*; citing *Norwood*, 349 U.S. at
9 42.

10 Where the action has little connection with the chosen forum, less deference is accorded plaintiff's
11 choice, even if plaintiff is a resident of the forum. *Id.*, citing *Cain v. New York State Board of Elections*,
12 630 F. Supp. 221, 227 (E.D.N.Y. 1986). *See also Chrysler Capital Corp. v. Woehling*, 663 F. Supp.
13 478 (D.Del. 1987); *Hernandez v. Graebel Van Lines*, 761 F. Supp. 983, 990 (E.D.N.Y. 1991). In patent
14 infringement actions, the preferred forum is "that which is the center of gravity of the accused activity."
15 *Ricoh Co., Ltd., v. Honeywell, Inc.*, 817 F. Supp. 473, 482 n. 17 (D.N.J. 1993); *quoting S.C. Johnson &*
16 *Sons, Inc., v. Gillette Co.*, 571 F. Supp. 1185, 1188 (N.D. Ill. 1983). The district court "ought to be as
17 close as possible to the milieu of the infringing device and the hub of activity centered around its
18 production." *Id.* Here, the alleged infringement occurred on defendants' websites, which were designed
19 and are maintained at defendants' business headquarters in New York (Cendant), New Jersey (Avis and
20 Budget), Connecticut (Trilegiant), and Chicago, Illinois (Orbitz). Although none of the defendants
21 actually has its headquarters in Delaware, their chosen forum state, they provided at oral argument a
22 convincing demonstration of the proximity of the New York and New Jersey offices to the Delaware
23 court. Thus the center of gravity in this case, based on the "hub of activity" around the infringing
24 websites, lies far to the east of Seattle, and weighs in favor of the Delaware forum.

25 As to the relative convenience to the parties, the Court may not transfer a case simply to shift the
26 burden from one party to another. *Decker Coal*, 805 F. 2d at 843. However, the Court may look at the
27 sheer weight of the numbers—two plaintiffs versus five defendants, in considering convenience. *Selah*,

361 F. Supp. 2d at 1162 (quoting *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1120 (C.D.Cal. 1998)). This factor thus favors transfer.

2. Convenience of the witnesses.

When considering the convenience to witnesses, “the convenience of non-party witnesses is the more important factor.” *Saleh*, 361 F. Supp. 2d at 1160 (quoting *Aquatic Amusement Associates, Ltd. v. Walt Disney World Co.*, 734 F. Supp. 54, 57 (N.D.N.Y. 1990)). The Court should consider not only how many witnesses each side may have, but also the relative importance of their testimony. *Id.*, citing *Gates Learjet Corp. v. Jensen*, 743 F. 2d 1325, 1335-36 (9th Cir. 1984) (a *forum non conveniens* case). Plaintiff has named four party witnesses and four non-party witnesses, patent inventors who are no longer employed at Amazon. All are located in Seattle. Defendants have named eight party witnesses, who are located in New Jersey (Avis and Budget), Chicago (Orbitz), and Connecticut (Trilegiant). While defendants have not named any non-party witnesses, this is understandable due to the early stage of these proceedings. As to the non-party witnesses, defendants have not demonstrated any benefit from transfer of the case. However, this case will necessarily involve expert witnesses, who will have to appear for a Markman hearing as well as for trial. Plaintiffs may well have the same expert witnesses for this case as for the case already in Delaware. If so, that factor would strongly favor litigation of this matter in Delaware.

3. Interest of Justice.

The interest of justice factor is the most important of all. *Nelson v. Master Lease Corporation*, 759 F. Supp. 1397, 1402 (D.Minn. 1991); citing *Medtronic, Inc., v. Americal Optical Corporation*, 337 F. Supp. 490, 495-97 (D.Minn. 1971). “Consideration of the interest of justice, which includes judicial economy, ‘may be determinative to a particular transfer motion, even if the convenience of the parties and witnesses might call for a different result.’” *Regents of the University of California v. Eli Lilly and Company*, 119 F. 3d 1559, 1565 (D.C.Cir. 1997). In considering the interests of justice, the Court weighs such factors as “ensuring speedy trials, trying related litigation together, and having a judge who is familiar with the applicable law try the case.” *Heller Financial, Inc., v. Midwhey Powder Co.*, 883 F. 2d 1286, 1293 (9th Cir. 1989). Overall, these factors favor the Delaware forum.

1 First of all, there is a related case in Delaware. "The pendency of related actions in the transferee
2 forum is a significant factor in considering the interest of justice factor." *Jolly v. Purdue Pharma L.P.*,
3 2005 WL 2439197 at *2 (S.D. Cal.) (citing *A.J. Industries, Inc., v. United States District Court for the*
4 *Central District of California*, 503 F. 2d 384, 389 (9th Cir. 1974); *Continental Grain v. The Barge FBL-*
5 *585*, 364 U.S. at 26. "Litigation of related claims in the same tribunal is strongly favored because it
6 facilitates efficient, economical and expeditious pre-trial proceedings and discovery and avoid[s]
7 duplicitous [sic] litigation and inconsistent results." *Durham Products, Inc., v. Sterling Film Portfolio,*
8 *Ltd., Series A*, 537 F. Supp. 1241, 1243 (S.D.N.Y. 1982). Plaintiffs assert that this case is not similar to
9 the Delaware case because the two cases involve "different patents, different witnesses, different
10 document, different technologies, and different issues." Plaintiff's Opposition, p. 14. However, the cases
11 both concern software patents which relate to internet commerce, and are similar enough that they should
12 be considered by the same court in order to conserve judicial resources and prevent inconsistent rulings.
13 Moreover, it is inconsistent for plaintiffs to argue that the cases are not similar when it was Amazon who
14 filed a "notice of related action" in the Delaware case. Amazon stated in that notice that the two cases
15 involve "substantially the same parties."

16 The congestion of the court's docket is another factor to be considered under this heading.
17 Defendants have offered evidence from the federal court's website indicating that the District of
18 Delaware has a lower per-judge civil caseload (441 cases) than this district (655 cases). Plaintiff, on the
19 other hand, has countered with statistics on the median time to trial in the two districts: 16.4 months in
20 this district versus 26 months in Delaware. Generally, the courts find this to be the more important
21 statistic. "The real issue is not whether a dismissal will reduce a court's congestion but whether a trial
22 may be speedier in another court because of its less crowded docket." *Gates Learjet Corp.*, 743 F. 2d at
23 1337. Here, however, the statistic as to the "speedier trial" offered in Washington is illusory. This
24 Court's docket is not "less crowded"; it is more. The statistics on median time to trial do not separate
25 types of trials and thus do not account for the great complexity of patent cases, which take considerably
26 longer to come to trial. In this Court, a patent case would not be scheduled for trial 16.4 months after
27 filing; in the Court's experience it takes that long simply to arrive at the Markman hearing. Thus it
28

1 cannot be said that a speedier trial could be had here than in Delaware.

2 It is the judicial economy factor which weighs most heavily in favor of the Delaware forum. "In a
3 case such as this in which several highly technical factual issues are presented and the other relevant
4 factors are in equipoise, the interest of judicial economy may favor transfer to a court that has become
5 familiar with the issues." *Regents of the University of California*, 119 F. 3d at 1565. Having handled
6 the related case, the Delaware court will be already familiar with the complex technological issues and
7 the applicable law.

8 Transfer will also promote judicial economy in that it will facilitate consolidation and settlement.
9 While consolidation of the two cases is a matter for the Delaware court to decide, the feasibility of such
10 consolidation is a factor that this Court may consider in deciding whether to allow a transfer. *University*
11 *of California v. Eli Lilly & Co.*, 21 U.S.P.Q. 1201, 1207 (N.D.Cal. 1991). Even if they are not
12 consolidated, transfer of this case will allow a global settlement of the related cases.

13 Finally, litigation in Delaware would satisfy the "local interest" factor. Delaware has a strong
14 interest in litigation between the companies in this suit, all of which are incorporated there. *Hi-Pac, Ltd.*
15 *v. Avoset Corporation*, 980 F. Supp. 1134, 1141 (D.Haw. 1997).

16 As the Court has determined to grant the motion to transfer pursuant to § 1404, there is no need
17 to address the alternative arguments under the "first to file" rule.

18 CONCLUSION

19 Accordingly, defendants' § 1404(a) motion to transfer is GRANTED, and this case is
20 TRANSFERRED to the United States District Court for the District of Delaware. The Clerk shall close
21 the file and notify the Clerk of Court in that district. Defendants' pending motion to dismiss is DENIED
22 without prejudice to renewal in the Delaware court.

23
24 Dated this 13 day of December 2005.

25
26 

27 RICARDO S. MARTINEZ
28 UNITED STATES DISTRICT JUDGE

EXHIBIT E



ROTHWELL, FIGG, ERNST & MANBECK, P.C.

1425 K Street, N.W.
Suite 800
Washington, D.C. 20005

Telephone 202-783-6040
Facsimile 202-783-6031
www.rfem.com

January 24, 2006

Via E-Mail

Wendy L. Bjerknes, Esq.
Fenwick & West LLP
Silicon Valley Center
801 California St.
Mountain View, California 94041

Re: CD Intellectual Property Holdings LLC v. Amazon.com, Inc.
Our File No.: 3339-101

Dear Wendy:

Attached is a redlined version of the draft Stipulated Protective Order. As you can see, this draft incorporates many of the changes/additions you proposed, including additional source code protections. Please let me know if Amazon will agree to the terms of this draft.

In response to your request for the positions of the three attorneys listed in paragraph 12.c of the draft Stipulated Protective Order, Andrew Hollander is Senior Counsel, Cendant Corporation, Scott McLester is Senior Vice President - Legal Cendant Corporation and Curt Stevens is Senior Vice President Legal Department, IT and IP Group Cendant Corporation. Please provide me with the positions of the individuals listed in paragraph 12.d of the draft Stipulated Protective Order.

I look forward to your prompt response.

Very truly yours,

Elizabeth A. Leff

G. Franklin Rothwell
E. Anthony Figg
Barbara G. Ernst
Harry F. Manbeck, Jr.
George R. Repper
Steven Lieberman
Joseph A. Hynds
Elizabeth A. Leff
Richard Wydeven
Martin M. Zoltick
Minaksi Bhatt
Sharon L. Davis
Robert B. Murray
Carla C. Calcagno
Jeffrey L. Ihnen
Glenn E. Karta
Martha Cassidy, Ph.D.
Brian S. Rosenbloom

Anne M. Sterba
Lisa N. Phillips
Leigh Z. Callander
C. Nichole Gifford
Patrick T. Skacel
Monica C. Kitts
Brian A. Tollefson
Joo Mee Kim*
Steven M. Giovannetti
Hyunkwon Ryu
R. Elizabeth Brenner
Adam M. Treiber
Daniel L. Shores
Joseph E. Green

Of Counsel
John A. McCahill
Barbara Webb Walker, Ph.D.

*Not Admitted in D.C.

EAL:whc

enc.

cc: Steven Balick, Esq.

Bjerknes.L17.wpd